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THE AGE 60 RULE — IT IS TIME TO DEFEAT IT!

GENEVE DUBOIS

IMAGINE A MOTHER just had a newborn baby. She prohibits her six-year-old son, Tom, to go close to the baby or enter the baby's room. When Tom asks for a reason, she says, "Because boys over five years old are rough around babies. It is for her safety!" As outsiders objectively analyze this situation, our first question would probably be: how do you know boys over five years of age will endanger babies? She would reply that she based her reasoning on several studies that show that boys over five are rough, and, hence, for the safety of her baby, she firmly believes that Tom should not go close to the baby. Even without conflicting theories regarding boys' rough behaviors, we all know that every child is different and with proper safety measures, Tom should be allowed to perform his role as a brother — provide guidance, love, and friendship to his baby sister. The mother's rule would be even more frivolous if studies of boys' behaviors actually show conflicting results. A reasonable person would conclude that Tom has the right to be a big brother, and, unless he shows any sign of endangering the baby, he should be allowed to go close to his baby sister. We would easily agree that a rule like the one in this scenario is invalid, even though its justification is for the protection of someone else's safety, because it takes away a person's right without a proper foundation.

If we can make a fair judgment for Tom, then we should not have any problem making a fair judgment for commercial airline pilots by disallowing a rule that prohibits them from being a pilot or copilot simply because they reach age 60.¹ This rule is commonly known as the "Age 60 Rule."² Just like Tom's mother, the Federal Aviation Administration's ("FAA") justification for the rule is safety.³ And likewise, the FAA's justification

¹ See 14 C.F.R. § 121.383(c)(2005).

² Beatrice Kathleen Barklow, *Rethinking the Age Sixty Mandatory Retirement Rule: A Look at the Newest Movement*, 60 J. AIR L. & COM. 329, 331 (1994).

³ *Id.*

lacks proper foundation. This Comment will show that this is a critical time to defeat the "Age 60 Rule" and the reasons why the rule should be defeated. The Comment consists of three main sections. The first section outlines recent developments in the airline industry and economy which lead to an urgent calling to overturn the rule. The second section explains the reasons that the "Age 60 Rule" should be overturned. The third section presents some possible alternatives to this rule.

I. RECENT DEVELOPMENT AND HISTORY

To defeat the "Age 60 Rule," society must first understand the creature's nature. This section explores the history of this forty-five-year-old rule, and why this is the time to change or eliminate it.

A. THE HISTORY OF THE "AGE 60 RULE"

The FAA enacted the "Age 60 Rule" in 1959. The rule is codified under Title 14 of the Code of Federal Regulations,⁴ which applies to all Part 121 pilots—"commercial aircraft pilots carrying more than thirty passengers or with payloads exceeding 7,500 pounds."⁵ The rule states:

No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.⁶

The rule provides no exception.⁷ In the past 45 years, many pilots applied for exemptions to this rule, but all were denied by the FAA and the courts.⁸ In 1995, this rule extended to the Part 135 pilots—commercial pilots who operate smaller airplanes or helicopters.⁹ Therefore, commercial pilots must give up their

⁴ 14 C.F.R. § 121.383(c).

⁵ Barklow, *supra* note 2, at 331.

⁶ 14 C.F.R. § 121.383(c).

⁷ *Id.*

⁸ Brief of Petitioners, *Butler v. FAA*, 2004 WL 2203953 (D.C. Cir. 2004) (No. C3-1386), *available at* http://www.age60rule.com/docs/PPF_BRIEF_031004.pdf (citing *Yetman v. Garvey*, 261 F.2d 664 (7th Cir. 2001); *PPF v. FAA*, 118 F.3d 758 (D.C. Cir. 1997); *Aman v. FAA*, 856 F.2d 946 (7th Cir. 1988); *Keating v. FAA*, 610 F.2d 611 (9th Cir. 1979); *Gray v. FAA*, 594 F.2d 793 (10th Cir. 1979); and *Starr v. FAA*, 589 F.2d 307 (7th Cir. 1978)) [hereinafter *Petitioners' Brief*].

⁹ Captain Ralph Hunter, Statement Submitted to United State Senate Special Committee on Aging on Airline Age 60 Rule, 9 PILOT PERSPECTIVE (Oct. 2004).

positions on their 60th birthdays, regardless of the fact that they have passed the most rigid physical and simulation tests required by the FAA. For this reason, the rule gives a whole different meaning to the words "Happy Birthday!"

B. WHY THIS IS THE TIME TO DEFEAT THE RULE

Even though the "Age 60 Rule" recently celebrated its forty-five-year anniversary, society has fought against the rule since its beginning. The Air Line Pilots Association ("ALPA") first challenged the rule immediately after its enactment in 1959.¹⁰ Later on in 1979, "[t]he aviation subcommittee recommend[ed] overturning the "Age 60 Rule" by legislation."¹¹ Within the last five years, activities to defeat the rule have intensified. In February 2001, a bill to "Establish Age Limitations for Airmen" was introduced to the Senate Committee on Commerce, Science, and Transportation to change the mandatory retirement age to 65.¹² In March 2003, a bill "[t]o limit the age restrictions imposed by the Administrator" was introduced to the House of Representatives ("the House").¹³ One month later, a bill introduced to the Senate came very close to ending the age discrimination among airline pilots.¹⁴ Currently, a bill "[t]o amend the age restrictions for pilots" has been introduced to the House to prohibit the FAA from disallowing a pilot from flying a commercial airplane solely based on his age.¹⁵ Although none of these activities have succeeded yet, two new organizations (Air Line Pilots Against Age Discrimination and Professional Pilots Federation), which formed to fight for pilots' rights, are definitely pushing hard to overturn the rule.¹⁶ A strong momentum is emerging in society to defeat the "Age 60 Rule."

This momentum is gaining, largely due to negative changes in the airline industry after the 9/11 terrorist attacks and the aging of the baby boomers. The combination of these two factors

¹⁰ Barklow, *supra* note 2, at 339.

¹¹ Professional Pilots Federation, *Age 60 Rule Chronology*, at <http://www.ppf.org/chrono.htm> (last visited May 7, 2005) [hereinafter Chronology].

¹² Aerospace Medical Association, *Aerospace Medical Association Position Paper: The Age 60 Rule* (Jan. 15, 2004), at http://www.age60rule.com/docs/asma_position.html (last visited May 7, 2005) [hereinafter Aerospace].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ H.R. 65, 109th Cong. § 1(k) (2005) [hereinafter House Hearing].

¹⁶ See Professional Pilots Federation, at www.ppf.org; (last visited May 7, 2005); see also Airline Pilots Against Age Discrimination, at www.apaad.org (last visited May 7, 2005).

leads to tremendous negative economic and social impact on the increasingly large number of aging pilots.

1. *Negative Changes in the Airline Industry*

The 9/11 terrorist attacks have changed Americans' lives in many ways. The most direct impact is on the airline industry. Within the first year after the attacks, airlines lost a combined \$7.7 billion and \$6 billion the next year, even after the \$5 billion cash bailout from the government.¹⁷ They also have suffered more than 80,000 layoffs.¹⁸ Many airlines filed for bankruptcy over the past four years, including Delta, US Airways, UAL, ATA, and Hawaiian Airlines.¹⁹ US Airways, in particular, filed notice that it would terminate the pension plan for its pilots.²⁰ UAL also "announced its deferment of the \$72 million payment to its pension fund."²¹ When airlines default or shrink their funding of a pension plan, the federal government's Pension Benefit Guaranty Corporation ("PBGC") has to assume the plan, "but it will only be liable for \$600 million of the anticipated \$2.5 billion that the plan was underfunded."²² This means that a pilot, who had expected a pension of about \$75,000 per year from the original plan, may now only receive about \$25,000 per year when he retires at age 60.²³ This is because PBGC penalizes anyone who retires earlier than age 65.²⁴ If pilots are allowed to work until age 65, they would receive \$45,000 per year instead.²⁵ Moreo-

¹⁷ Steve Huettel, *Airlines Don't See Relief Over Horizon*, ST. PETERSBURG TIMES, Sept. 7, 2002, available at <http://www.sptimes.com> (last visited May 7, 2005).

¹⁸ *Id.*

¹⁹ Consumer Affairs, *ATA Files for Bankruptcy* Oct. 23, 2004, at <http://www.consumeraffairs.com> (last visited May 7, 2005) [hereinafter ATA].

²⁰ Jim Jubak, *The War on Your Retirement*, Feb. 7, 2003, at <http://moneycentral.msn.com/content/P40620.asp> (last visited May 7, 2005).

²¹ Joseph Kay, *United Airlines Announces Deferment on Pension Payments*, July 20, 2004, at <http://www.wsws.org/articles/2004/jul2004/ual-j20.shtml> (last visited May 7, 2005).

²² *Politics and Economy: Pension Pain*, at <http://www.pbs.org/now/politics/pensions.html> (last visited May 7, 2005).

²³ *Id.*

²⁴ Paul Emens, Testimony Before House Aviation Subcommittee (Mar. 12, 2003), at <http://www.house.gov/transportation/aviation/03-12-03/emens.html> (last visited May 7, 2005).

²⁵ *Id.*

ver, senior pilots would continue to pay into their pensions and Social Security for the additional five years.²⁶

2. *Aging of the Baby Boomers*

The problem of the \$50,000 decrease in pension payment per year has magnified due to the aging of the baby boomers. Demographers predict that by the year 2005, "more than one-half of the population of the U.S will be over 50 years of age."²⁷ The number of older pilots also reflects this trend. From 1971 to 1994, the number of older pilots increased more than 300 percent.²⁸ When the "Age 60 Rule" was enacted, there were no active airline transport pilots age 60 or over.²⁹ Today, 27 percent of the U.S. pilots are older than age 50.³⁰ Not only are more people being affected by the decreased pension plan, but these people are also ineligible to receive Social Security until age 65.³¹ Therefore, pilots who are forced to retire at the age of 60 have to struggle through an already impaired economy with only \$25,000 per year of total income.

Although pilots have been challenging the "Age 60 Rule" for forty-five years, now it is more urgent than ever to change or eliminate this rule. As one pilot put it in his letter to Senator Dianne Feinstein, "We are depending on these pensions earned over more than 30 years of each of our employments with UAL to pay for our retirement living . . . [since] the FAA forced me to retire at age 60[,] I was not able to delay my retirement and work any additional years to make up for any loss of pension income."³² Obviously, more and more pilots are facing the same problem each year as they blow out the candles on their 60th

²⁶ Jim Gibbons, Testimony Before United States Senate Special Committee on Aging (Sept. 14, 2004), at <http://www.house.gov/gibbons/091404.asp> (last visited May 7, 2005).

²⁷ Janet E. Truluck, *Learning Style Preferences Among Older Adults*, 25 EDUCATIONAL GERONTOLOGY 221 (May 1, 1999), available at <http://taylorandfrancis.metapress.com> (last visited May 7, 2005).

²⁸ Charles LeMenager, *You're Never Too Old to Fly*, at <http://flighttraining.aopa.org/learntofly/articles/2553.cfm> (last visited May 7, 2005).

²⁹ Maximum Age Limitations for Pilots, 24 Fed. Reg. 5248 (June 27, 1959) (codified at 14 C.F.R. pt. 40).

³⁰ LeMenager, *supra* note 28.

³¹ *From Now On, We Don't Get Social Security at 65*, at <http://www.seniorjournal.com/NEWS/SocialSecurity/3-01-27DoNotRetireat65.htm> (last visited May 7, 2005) [hereinafter Senior Journal].

³² *Letters To Leaders – United Airlines Termination of Pension Plans*, USA TODAY (Jan. 9, 2005) available at https://ssl.capwiz.com/usatoday/bio/userletter/?id=347&letter_id=170596656&content_dir=congressorg (last visited May 7, 2005).

birthday cakes. Society can only expect more intense movements in the next few years to change the Age 60 Rule. The FAA can no longer say, "there is no pressure to make a change[.]" as they said in December 2004, to justify not changing the rule."³³

II. WHY THE AGE 60 RULE SHOULD BE DEFEATED

Not only has the current economic situation created an urgent need to change the rule, but legislative history, extrinsic evidence, and profound studies all point to one fact: safety was never and is not the justification for the "Age 60 Rule." For this reason, all other countries have abandoned the rule and most organizations and courts in this country see the need to do the same thing. The Supreme Court appropriately summarized the negative impact of the "Age 60 Rule" in *Western Airlines v. Criswell*:

Increasingly, it is being recognized that mandatory retirement based solely upon age is *arbitrary* and that chronological age alone is a poor indicator of ability to perform a job Such forced retirement can cause hardships for older persons through loss of roles and loss of income *Society, as a whole suffers* from mandatory retirement as well . . . skills and experience are lost from the work force resulting in reduced GNP. Such practices also *add a burden to Government income maintenance programs* such as social security.³⁴

A. SAFETY WAS NEVER AND IS NOT THE JUSTIFICATION FOR THE "AGE 60 RULE"

Since the beginning of the "Age 60 Rule," the FAA has relied on safety as its justification. This justification is now more appealing than ever to society because of our increasing concerns about flying safety after the 9/11 terrorist attacks. However, if we evaluate the foundation of this justification, we will find that it stands on shaky ground because: (1) the FAA's initial reasons to enact the rule were invalid; (2) extrinsic evidence proves that safety was never the FAA's real reasoning; (3) the FAA did not

³³ Bill Adair and Steve Huettel, *Are Pilots Really Too Old to Fly at Age 60?*, ST. PETERSBURG TIMES, Dec. 28, 2004, (on file with the *Journal of Air Law & Commerce*) [hereinafter Adair].

³⁴ Thomas Wells, *From the Cockpit to the Nursing Home: A Look at the Recent Developments in the Law Concerning The Age-60 Rule*, 57 J. AIR L. & COM. 755, 761-62 (1992) (emphasis added) (citing *W. Airlines Inc. v. Criswell*, 472 U.S. 400, 410-411 (1985)).

base its reasoning on well-founded studies; and (4) other profound studies show contradictory results. The only reason that it is still standing is because we, as a society, ignore the truth—safety was never and is not the justification for the “Age 60 Rule.” It is time for us to open our eyes and see the creature’s true face.

1. The FAA Did Not Provide Valid Reasons for Enacting the Rule

The FAA released its initial justifications for the “Age 60 Rule” on June 27, 1959, in a notice to the public released before the FAA proposed the rule.³⁵ The notice followed the usual FAA procedure requiring it to inform the public of the reasoning for the new rule and to request the public’s comments.³⁶ In the notice, the FAA provided passenger safety as the main justification for the new rule.³⁷ It supported this position by providing several reasons that pilots over 60 might endanger passengers’ lives: (1) aging leads to progressive and unpredictable deterioration of certain important physiological and psychological functions; (2) no method can be used to detect the deterioration of aging; (3) sudden incapacity might be induced by the increasing risk of cardiovascular disease among older people; and (4) the ability to learn is known to decline with age.³⁸ Although these reasons sound legitimate, the FAA failed in its justifications to provide solid evidence that proves a direct causal link between pilots over age 60 and airplane accidents. The whole view that the rule is necessary to “assure the highest degree of safety” is no more than speculation.³⁹ Therefore, the rule never should have been enacted in the first place.

The first flaw in the FAA’s justification is: it was not based on occurrence of accidents caused by pilots’ age. In reality, no accident was caused by pilots over age 60 at that time because there were “no active airline transport pilots aged 60 or over” in 1959 or before.⁴⁰ In fact, the FAA predicted that there might be 80 active airline transport pilots in that age group by 1962.⁴¹ Since there was no true occurrence of accidents caused by older pilots, the FAA had to base its whole foundation on pure “theory” and

³⁵ 24 Fed. Reg. at 5248.

³⁶ *See id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

"findings" to assess the likelihood of accidents occurring due to aging pilots.⁴²

The second flaw in the justification is: the theory and findings the FAA used did not establish a likelihood of future accidents due to aging pilots. The FAA gave few findings to show that aging causes "progressive deterioration of certain important physiological and psychological functions" in the general population.⁴³ The FAA also stated that "[p]hysical deterioration with age can, for the most part, be attributed to a progressive degenerative process . . . [which would affect] blood vessels."⁴⁴ It stated further, "[This] reduces the efficiency of function of bodily systems . . . [and affects] the heart and brain."⁴⁵ The FAA also presented studies regarding incapacity, which stated that "incapacity occurs without prior symptoms and in the presence of normal medical findings."⁴⁶ Moreover, the FAA added, "ability to learn is [also] known to decline with age."⁴⁷ The FAA believed that this would affect "the introduction of older pilots into new types of aircraft."⁴⁸ Based on these reasons, the FAA concluded that aging pilots would endanger the lives of passengers.⁴⁹

Although on their face these studies are profound and almost scary, they only applied to the *general population* and not specifically to pilots. The FAA would never allow just a regular John Doe on the street to fly an airplane. To become a commercial pilot, one must pass stringent physical and psychological tests to meet the high standard of qualification.⁵⁰ As Dr. Robin Wilkening, an occupational medicine specialist, stated in his testimony to the United States Senate Special Committee on Aging in September 2004, "Pilots tend to be healthier than the general population . . . [t]heir physical and mental fitness gets more scrutiny than almost any other professionals"⁵¹ Therefore, studies that apply to the general population cannot accurately predict the behaviors of pilots. They can be a secondary reference, but not the sole foundation for establishing the likelihood of acci-

⁴² See *id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See *id.*

⁵⁰ See Gibbons, *supra* note 26.

⁵¹ Adair, *supra* note 33.

dents that might be caused by aging pilots. Even the FAA admitted that there was a lack of completeness in studies to show a link between aging deterioration and older people of a specific occupation.⁵² Without studies to show pilots' deterioration with age, there was no direct evidence to establish the theory that aging pilots at age 60 would be likely to cause more accidents than pilots in other age groups. To enact a rule that takes rights away from a group of people based solely on a general inference is not only unfair, but absurd.

The third flaw in the justification is: age 60 was only an arbitrary line. Even if the studies in the notice applied to the pilots, which they did not, none of the studies established that age 60 was where the line should be drawn.⁵³ In fact, the FAA admitted that "presently available data do not permit any precise determination of the specific age at which continued activity as a pilot can be said conclusively to constitute a hazard to safety."⁵⁴ The studies in the notice actually produced somewhat conflicting results with the age 60 line that the FAA drew. One study showed that "the death rate from heart disease. . . has been found to be ten times greater for persons aged 45 to 64 than for those aged 25 to 44."⁵⁵ It further stated that "[b]y age 65, cardiovascular disease. . . causes more deaths than all other medical conditions combined."⁵⁶ The FAA also stated that "it is known. . . from available studies. . . that the detrimental effects on physiological and psychological functions have become significant by age 55."⁵⁷ According to these studies, the logical age line that the FAA should have drawn was age 55, not 60. This might have been reasonable in 1959 if the general population was allowed to be pilots because the average life expectancy at birth in 1960 was only 69.7.⁵⁸ Of course, the age 55 line would not apply nowadays because the average life expectancy has risen to 82.4 in

⁵² 24 Fed. Reg. at 5248.

⁵³ *See id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Todd Raphael, *Why Senior Citizens Should Fly – Raising Retirement Age for Pilots – Brief Article – Statistical Data Included*, April 2001 (on file with the Journal of Air Law & Commerce).

2004.⁵⁹ Drawing a line at age 60, the FAA went against its own studies. Therefore, age 60 was an arbitrary line.

By analyzing the original reasoning the FAA provided in its notice to enact the "Age 60 Rule," it is obvious that (1) the FAA did not base it on any true occurrence of accidents caused by pilots who have turned 60; (2) the FAA failed to establish the likelihood of accidents that might be caused by aging pilots because no studies were specifically done on pilots' deterioration with age; and (3) age 60 was an arbitrary line that was lacking in scientific proof. Without well-founded proof, the link between pilots over age 60 and airplane accidents is totally hypothetical. Since there is no link, the "Age 60 Rule" has nothing to do with "assur[ing] the highest degree of safety" in the sky.⁶⁰ Safety was only an excuse that the FAA used to enact the rule in 1959. A rule that should not have been enacted in the first place cannot be allowed to continually stand on its shaky ground.

2. *Evidence Proves That Safety Was Not the FAA's Real Reasoning*

Besides the fact that the notice to the public reflected that the true reasoning for the "Age 60 Rule" was not safety, a large amount of extrinsic evidence also confirmed this finding. In a letter dated April 17, 1959, from the FAA's first administrator, Elwood Quesada, to the Reverend Theodore Hesburg, Quesada urged Hesburg to serve on a board to approve the Age 60 Rule: "There exists at present no sound scientific evidence that airline piloting, or any other aeronautical activity, becomes critical at any given age."⁶¹ In the same year, the "FAA admitted that there was neither operational nor historical support for its new regulation" in its official press release for the Age 60 Rule.⁶² When a reporter asked, "Has it been demonstrated that age is a factor in the occurrence of air carrier accidents?" The FAA replied, "No. Fortunately there are very few air carrier accidents."⁶³ From the beginning, the FAA's in-house lawyers stated that "there was no

⁵⁹ *Individual Retirement Arrangements (IRS)*; Internal Revenue Serv. Publ'n No. 590 (2004), Appendix C, available at <http://www.irs.gov/pub/irs-pdf/p590.pdf> (last visited May 7, 2005) [hereinafter *IRS*].

⁶⁰ 24 Fed. Reg. at 5248.

⁶¹ Bert Yetman, Statement to Nat'l Civil Aviation Rev. Comm'n (Oct. 8, 1997) [hereinafter *Yetman*] (on file with the Journal of Air Law & Commerce).

⁶² Letter from Samuel D. Woolsey to Marion C. Blakey, Administrator, FAA (Jan. 15, 2003), at http://www.age60rule.com/docs/data_quality_ltr.html (last visited May 7, 2005) [hereinafter *Woolsey*].

⁶³ *Id.*

evidence that could provide any 'scientific or factual justification' for the rule."⁶⁴ Later on, a senate report stated that "the rule was adopted 'without the benefit of medical or scientific studies and without public comment.'"⁶⁵ In 1984, the Federal Air Surgeon, Dr. Frank Austin, stated in his letter to Dr. Stan Mohler, a former FAA medical staff member, "There is no medical basis for the Age 60 Rule. I believe this and Admiral Engen (then FAA Administrator) believes this. It's an economic issue."⁶⁶

If it was not for the safety reason, then why did the FAA enact the Age 60 Rule? The answer can be found in the Federal Air Surgeon's statement, "It's an economic issue."⁶⁷ The rule was actually based on a labor dispute between American Airlines ("AA") and its pilots in the 1950s.⁶⁸ At that time, "airlines were facing huge costs to train pilots for a new wave of jet planes, including the Boeing 707 and Douglas DC-8."⁶⁹ In order to reduce costs, airlines wanted to fire their older pilots and hire younger pilots because younger pilots were cheaper to train.⁷⁰ Because of this, AA President C.R. Smith got in a dispute with his pilots.⁷¹ In order to not reinstate the three older pilots who had brought a grievance against his carrier, Smith turned to his old friend with clout, Elwood Quesada, who was the first FAA Administrator.⁷² Smith stated that there should be a suitable age for pilots to retire.⁷³ Of course, the FAA could not solely rely on Smith's request to justify the "Age 60 Rule," so it "relied on medical studies about how aging affected the body and mind" of the general population.⁷⁴ The study was never intended to apply to pilots.⁷⁵ The FAA "issued its Notice of Proposed Rulemaking. . . less than one month after Quesada received Smith's personal entreaty asking for such a rule."⁷⁶ In

⁶⁴ Petitioners' Brief, *supra* note 8.

⁶⁵ Adair, *supra* note 33.

⁶⁶ Yetman, *supra* note 61.

⁶⁷ *Id.*

⁶⁸ Gibbons, *supra* note 26.

⁶⁹ Adair, *supra* note 33.

⁷⁰ *See id.*

⁷¹ *Id.*

⁷² *Id.*; Vincent Czaplyski, *The Age 60 Rule: How It Came To Be*, at <http://www.avweb.com/cgi-bin/udt/im.display.printable?client.id=avweb&story.id=181875> (last visited May 7, 2005).

⁷³ Adair, *supra* note 33.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Czaplyski, *supra* note 72.

a way, Quesada personally believed that this rule was reasonable because of his "military flying experience with younger pilots and with pilots retiring from the military as young as 38 years of age."⁷⁷

Other events that developed in the next forty-five years also prove one fact—the FAA did not believe that pilots, at age 60, would be more likely to cause airplane accidents. For example, the rule does not apply to federal agency pilots, including the FAA's own pilots, who share the same airports and skies with commercial pilots.⁷⁸ The rule also does not apply to test pilots or NASA astronauts whose jobs demand even more intense physical and psychological activities than commercial pilots.⁷⁹ In addition, the rule does not apply to military pilots, including the pilot that flies the President's Air Force One.⁸⁰ Naturally, if the FAA truly believed that pilots over age 60 would be more likely to cause accidents, it would not have allowed them to fly airplanes that carry the President of the United States, or its own people, including the FAA Administrator. Moreover, it would not have allowed those pilots to share the same airports or skies as commercial airplanes.

The extrinsic evidence not only showed that there was no scientific basis to justify the "Age 60 Rule," but it also proved that the FAA never believed in its safety justifications. From the beginning, the FAA has been using "safety" as its shield to defend a rule that takes away people's right to work, so that a small group of businesses could obtain economic benefits.

3. *The FAA Did Not Base Its Reasoning on Well-Founded Studies*

To continually build up its "safety" shield, the FAA knew that it must provide some scientific studies to support its "safety" justification. Without scientific proof, the "safety" shield would break, and the "Age 60 Rule" would be defeated. The FAA understood that even though there was no scientific basis to back up the initial approval of the rule, as long as there are supportive scientific proofs later on, the public would stop questioning its validity. Therefore, the FAA contracted different studies over the years to show a link between pilots over age 60 and airplane

⁷⁷ Robert W. Routh, *Aviation and Aging Pilots*, 12 AIR & SPACE L. 6, 21 (1997).

⁷⁸ Petitioners' Brief, *supra* note 8.

⁷⁹ *See id.*

⁸⁰ *Id.*

accidents.⁸¹ However, the scientific studies have proven to be biased and misleading.⁸²

Out of the five major studies since 1978—IOM report, NIH report, Golaszewski study, Hilton Systems, and CAMI study—all the statistical analyses except the Hilton Systems “create [a] false *appearance* of an increase in risk by aggregating large amounts of extraordinarily safe [commercial] pilot data with those of various other classes of far less safe pilots.”⁸³ These studies compared the number of accidents with the number of total flight hours by putting the total flight hours in the denominator of the rate equation: Number of Accidents / Total Flight Hours.⁸⁴ The total flight hours are contributed by the flight hours of commercial pilots (Class I) and pilots from all other classes who are far less safe (Class II and III).⁸⁵ Therefore, the formula is: Number of Accidents / (Commercial Pilots Flight Hours + Class II Flight Hours + Class III Flight Hours).⁸⁶ The smaller the denominator is, the larger the risk would be.⁸⁷ The problem exists when the commercial pilots’ flight hours suddenly disappear due to the pilots’ retirement at age 60.⁸⁸ Since the commercial pilots contribute a disproportionate amount of flight hours to the denominator, the sudden loss of their flight hours decreases the denominator significantly.⁸⁹ This creates an illusion that the risk has increased among pilots who are 60 or over.⁹⁰ This is called the “Age 60 Rule Effect.”⁹¹

The initial IOM study was conducted in 1978 by the National Academy of Science’s Institute of Medicine.⁹² The study actually showed that age is not a significant factor of the subtle changes in pilots.⁹³ In response to this report, the National Institute of Aging produced a NIA report, which concluded that “there [was] no convincing medical evidence to support age 60, or any

⁸¹ See Woolsey, *supra* note 62.

⁸² *Id.*

⁸³ *Id.* (emphasis in original).

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See Woolsey, *supra* note 62.

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ *Id.*

⁹² *Id.* (citing *Airline Pilot Age, Health and Performance: Scientific and Medical Considerations*, Inst. of Med., Nat’l Acad. of Sci., Washington, D.C., March 1981).

⁹³ Woolsey, *supra* note 62.

other specific age, for mandatory pilot retirement" of commercial pilots.⁹⁴ However, the report still recommended retaining the "Age 60 Rule" because the "risk of accident increased with pilots above age 60."⁹⁵ Not only was the NIA study corrupted by the "Age 60 Rule Effect," but the Director of the NIA, Dr. T. Franklin Williams, later admitted that the NIA panel had been 'conned' by the FAA.⁹⁶ He stated, "The NIA Report represented a compromise intended to produce incremental change by the FAA. At the time the NIA Report was issued, many of its members, if not all, believed the FAA had already informally agreed to institute a program of post-60 piloting as recommended."⁹⁷ Shortly after this statement, the NIA withdrew the NIA report because "[the] NIA felt that — in its refusal — the FAA had reneged on its promise to work to gather reliable data."⁹⁸

Next, the FAA extensively relied on the Golaszewski 1983 Flight Time Study.⁹⁹ The study concluded that accident rates increase after pilots reach age 60.¹⁰⁰ However, this study had been criticized by many different sources. First, the Hilton Systems Study, conducted in 1993, criticized the Golaszewski study as being "inappropriate" and "misleading" because it had the "Age 60 Rule Effect."¹⁰¹ The Journal of the American Gerontological Society gave the same criticism.¹⁰² Even the Industrial Relations Court of Australia rejected the Golaszewski study for the same reason.¹⁰³ The court stated that "the Golaszewski study. . . is deeply flawed."¹⁰⁴ The court recognized the "Age 60 Rule Effect" in the study and stated, "I find it surprising, when I take that point into account, that the increase in post-60 acci-

⁹⁴ *Id.* (citing *Report of the National Institute on Aging Panel on the Experienced Pilots Study*, Dep't of Health and Human Serv., Pub. Health Serv., Nat'l Inst. of Health, Nat'l Inst. on Aging, Bethesda, MD, August 1981).

⁹⁵ *Id.*

⁹⁶ *Id.* (citing Declaration of T. Franklin Williams, M.D. for Hearing, Oct. 22, 1990, in *EEOC v. Lockheed Corp.*, CV 90-5253 TJH, (DC CD, CA)).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Wells, *supra* note 34, at 765.

¹⁰¹ Woolsey, *supra* note 62.

¹⁰² *Id.* (citing A.E. Stuck et al., *Multidimensional Risk Assessment Versus Age as a Criterion for Retirement of Airline Pilots*, J. AM. GERONTOLOGICAL SOC'Y, 40:526-532, 527 (1992)).

¹⁰³ Woolsey, *supra* note 62 (citing *Allman v. Australian Airlines Ltd. and Christie v. Qantas Airways Ltd.* Industrial Relations Court of Austl., No. NI. 879 of 1994, Wilcox CJ, 12 May 1995, at 59).

¹⁰⁴ *Id.*

dent rate is as small as it is.”¹⁰⁵ Even the Executive Officer of the Office of the Assistant Administrator for Aviation Safety, Mr. Kenneth Chin, rejected the Golaszewski study as a final product.¹⁰⁶ In a letter from Mr. Chin, dated July 24, 1991, he stated, “It should be noted that [the Golaszewski] study is unofficial because it was never formally published by the [FAA]. . . .We have not formally accepted this study as a final product because there are major data deficiencies. . . .[Any] use of this study to support any position may be questionable at best. . . .”¹⁰⁷ Even the study’s author, Mr. Golaszewski, stated that the study was not meant to be used to prove the performance of airline pilots.¹⁰⁸ In an interview with ABC News 20/20, the moderator, Stone Phillips, presented to Mr. Golaszewski that when pilots recalculated Golaszewski’s accident rates by eliminating the “Age 60 Rule Effect,” “the accident rate for active pilots in their 40’s and 50’s was higher than for pilots in their 60’s. And pilots in their 70’s had the lowest accident rate of all.”¹⁰⁹ In reply, Mr. Golaszewski said, “But you have to realize, in fairness, that I never set out to answer this question about the performance of airline pilots.”¹¹⁰ Obviously, the FAA had relied on a misleading source to defend the “Age 60 Rule.”

The only valid study that the FAA based its justification on is the Hilton Systems Study, which was conducted in 1990 by Hilton Systems, Inc. and Lehigh University.¹¹¹ The FAA not only contracted with these two organizations to specifically perform a study on pilots’ aging and accident rates, but it also contracted for a specific person to monitor this study.¹¹² Based on the study’s cautionary hint of 63 as a possible cut-off age, the FAA concluded that the “Age 60 Rule” should not be changed.¹¹³ Unlike the previous studies, the Hilton Systems Study was not corrupted by the “Age 60 Rule Effect” because Lehigh University refused to combine data from different medical classes of pilots.¹¹⁴ It tried to avoid the error that the Golas-

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See *id.* (citing 20/20: *Too Old Too Soon* (ABC news television broadcast, Feb. 9, 1990, show #1006)).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

zewski study had made.¹¹⁵ The original report that the Hilton Systems Study submitted to the FAA concluded that (1) commercial pilots are the safest pilots in the system — “not *merely* the safest, but by orders of magnitude,” (2) the “analyses provided no support for the hypothesis that the pilots of scheduled air carriers had increased accident rates as they neared the age of 60,” and (3) “the data for all the various groups of pilots were remarkably consistent in showing a modest decrease in accident rate with age. . . .”¹¹⁶ In fear that the FAA would not be satisfied with the conclusion of this study, the contracting employee, who monitored the study, requested Lehigh University to come up with a cut-off age.¹¹⁷ Lehigh University came up with age 63 by only observing pilots who do not fly commercial airlines (Class II and III).¹¹⁸ But the University stated that “these analyses give a hint, and a *hint only*, of an increase in accident rate for Class III pilots [the ones that do not fly commercial airlines] older than 63 years of age.”¹¹⁹ The FAA disregarded this statement and concluded that the study had drawn a line at age 63, and, hence, the “Age 60 Rule” should not be changed or eliminated.¹²⁰

The most recent study that the FAA cites is the CAMI study.¹²¹ This study was conducted in response to the Senate Appropriation Committee’s request for the FAA to perform a precisely defined statistical analysis on age versus accident rate.¹²² This study produced four different reports.¹²³ The reports basically corroborated the findings in the Golaszewski study—accident rate increases after pilots turn age 60.¹²⁴ However, the CAMI study made the same mistake as the Golaszewski study and was corrupted by the “Age 60 Rule Effect.”¹²⁵ One interesting note from Report 3 of the study was that when studying the accident rate of Part 135 pilots, who could fly past age 60 until 1995, there was no significant change of the risk between the younger

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* (emphasis added).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

aged group and the group that was between ages 60 to 63.¹²⁶ Similar to the Hilton Systems Study, the FAA ignored the unfavorable findings in Report 3 and concluded that since the accident rate increases after pilots turn 60, the “Age 60 Rule” should remain.¹²⁷

On January 15, 2003, Samuel D. Woolsey, an advocate for overturning the “Age 60 Rule” and the creator of the Age 60 Rule website, filed a complaint with the FAA under the Paperwork Reduction and Data Quality Acts regarding to the false studies the FAA relied on over the years.¹²⁸ The FAA’s response was that they were “matters of interpretation and emphasis rather than fact.”¹²⁹ The FAA also cited courts’ rulings in past cases, which “recognized that the Golaszewski Flight Time Study [had] some value, even though it [had] flaws.”¹³⁰ Finally, the FAA concluded that “the ‘Age 60 Rule’ is a long-standing operational rule that pre-dates studies completed subsequently.”¹³¹

In defending the “Age 60 Rule” for the past forty-five years, the FAA not only repetitively disregarded the unfavorable data, but it also relied on biased and misleading studies. Since scientific proof is the foundation of the safety justification without reliable scientific studies, safety is merely an illusion that the FAA has created in order to prolong the life of the “Age 60 Rule.”

4. *Studies Show Contradictory Results*

Although the FAA bases its justifications on false studies, it still continually and fiercely argues that there is a strong likelihood of accidents occurring due to the deterioration caused by the natural aging process of pilots. The FAA supports its argument with four major concerns: incapacitation, decrease in learning ability, unpredictability of the aging process, and impossibility to detect problems. However, many studies provide results that are contradictory to the FAA’s position in those four areas and expose the invalidity in the FAA’s arguments.

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ *Id.*

¹²⁹ Letter from Jon L. Jordan, Federal Air Surgeon, FAA, to Samuel D. Woolsey, creator of the Age 60 Rule website (Sep. 9, 2003), at http://www.age60rule.com/DQAct_frameset.html (last visited May 7, 2005) [hereinafter Jordan Letter].

¹³⁰ *Id.*

¹³¹ *Id.*

The FAA's first concern regarding the aging of pilots is incapacitation. In 1959, the FAA argued that because of the physical deterioration with age, aging pilots may experience sudden incapacitation due to cardiovascular disease.¹³² The FAA supported its claim with studies concluding that "the death rate from heart disease . . . has been found to be ten times greater for persons aged 45 to 64 than for those aged 25 to 44."¹³³ Today, the FAA is still hanging onto this argument even though no further study in the last forty-five years has supported this position. In fact, most studies show that the "concern over pilot's incapacitation causing a crash is simply unjustified."¹³⁴ It is unjustified because the chances of incapacitation occurring due to cardiovascular disease is extremely low.¹³⁵ According to the IATA data and simulator data, "the risk of incapacitation due to cardiovascular disease is only 1 event in more than 20 million flight hours. The calculated probability of a crash occurring as a result of incapacitation is [only] 1 event in every 8.3 billion flight hours."¹³⁶ In other words, there is only 1 episode every 400 years.¹³⁷ The study conducted by the Civil Aviation Authority ("CAA") of England also confirmed this conclusion.¹³⁸ It stated that "a major structural failure of the aircraft was 10 million times more likely to occur than a pilot incapacitation."¹³⁹ Based on this information, the CAA raised its pilots' mandatory retirement age to 65.¹⁴⁰ Other studies show that 80 percent or more of pilots' incapacitation is due to gastrointestinal problems and not cardiovascular disease as the FAA claims.¹⁴¹ In other words, passengers should fear their pilots having a bad hot dog much more than a heart attack or stroke.¹⁴²

Moreover, "the FAA's strict safety rules leave little chance that incapacitation would cause a crash."¹⁴³ As a Southwest Airlines

¹³² 24 Fed. Reg. at 5248 (June 27, 1959).

¹³³ *Id.*

¹³⁴ Robin Wilkening, *The Age 60 Rule: Age Discrimination in Commercial Aviation*, (Mar. 2001), at <http://www.pilotfriend.com/aeromedicine/2.htm> (last visited May 7, 2005).

¹³⁵ *Id.*

¹³⁶ *Id.* (emphasis added).

¹³⁷ *Id.*

¹³⁸ Yetman, *supra* note 61.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Adair, *supra* note 33.

captain, Stan Sutterfield, testified, "There are two pilots on board for the same reason we have two engines on the plane and two types of every (critical) system."¹⁴⁴ He was referring to the safety net feature that the FAA implemented, which is commonly known as the "fail-safe operation."¹⁴⁵ In fact, this system requires larger commercial airplanes to have three pilots on board: a captain, a co-pilot, and a flight engineer.¹⁴⁶ If anything happens to the captain, the co-pilot can easily take over and maintain control of the airplane. A 1966 study by the Irish Air Line Pilots' Association and Aer Lingus applauded this system.¹⁴⁷ The study examined the risk of accident resulting from pilots' "incapacitation in conjunction with the elimination of the third crewmember (flight engineer) on the new. . . BAC 1-11 aircraft."¹⁴⁸ The study concluded:

[W]hen both pilots are fully qualified: The total incapacitation of one pilot in the operation which was examined does not constitute an emergency condition of any greater magnitude than the other emergencies which the aircraft and its systems are designed to control. In a words, the 2-pilot crew complement in the operation is fail-safe.¹⁴⁹

Since the risk of the pilots' incapacitation is extremely low and the chance of any incapacitation causing a crash is almost non-existent, the FAA's concern over pilots' incapacitation causing a crash cannot be justified. Maybe that is why "there has never been a US air carrier accident due to [a pilot's medical problem]."¹⁵⁰

The FAA's other concerns are aging pilots' ability to learn and their cognitive performance. At the time the "Age 60 Rule" was enacted, airlines were in the process of introducing a new wave of jet planes into the aviation market, including the Boeing 707 and Douglas DC-8.¹⁵¹ Airlines were not only concerned about the training costs, but they were also questioning how fast the

¹⁴⁴ *Id.*

¹⁴⁵ Barklow, *supra* note 2, at 352-53; see Woolsey, *supra* note 62.

¹⁴⁶ Barklow, *supra* note 2, at 353.

¹⁴⁷ Woolsey, *supra* note 62.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Press release, Southwest Airlines Pilots' Association, Union President: It's time for Capitol Hill to end the Age 60 Rule (Sept. 17, 2004), at http://www.swapa.org/PressRelease/091704_Age60.pdf (last visited May 7, 2005) [hereinafter Southwest Press Release].

¹⁵¹ Adair, *supra* note 33.

older pilots could learn these new technologies.¹⁵² The FAA's statement in the 1959 Notice of Proposed Rulemaking reflected these concerns.¹⁵³ It stated, "[T]his decline [of the ability to learn] is one of importance to the introduction of older pilots into new types of aircraft."¹⁵⁴ The FAA believed that the older pilots would have a difficult time learning and retaining the new materials because "it requires the 'unlearning' of previously acquired knowledge and skills."¹⁵⁵ Therefore, the FAA thought that "the technology may be too complicated for older pilots."¹⁵⁶ The FAA continues to use this argument today because new jets are still being introduced to the market each year. However, the FAA's belief in the decline of learning ability among older pilots is false. Studies conducted throughout the years on learning ability and age show that:

- (1) "The intellectual decline depends more on the environment than on aging [because]. . . evidence [proves that] in many respects the healthy old brain is similar to the healthy young brain."¹⁵⁷
- (2) There is "no significant difference in learning styles of commercial airline pilots when categorized by age."¹⁵⁸
- (3) Difference in learning style is really based on gender and educational background.¹⁵⁹

The interesting finding in the studies is that while different occupations and ages have different types of learning style, the learning style between the entire pilot population and the adults between ages 60 to 65 are the same—"abstract conceptualization."¹⁶⁰ According to this, the older pilots possess an even stronger trait than the younger pilots in learning the pilot-specific knowledge. Therefore, it is only a myth that older pilots cannot be trained as successfully as younger pilots. In fact, improvements in technology can only mean that "pilots have planes that are easier to fly."¹⁶¹

¹⁵² See *id.*

¹⁵³ See 24 Fed. Reg. at 5250.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Barklow, *supra* note 2, at 334.

¹⁵⁷ Truluck, *supra* note 27.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (emphasis added).

¹⁶¹ Statement of Jagadeesh Gokhale before United States Senate Special Committee on Aging (Sept. 9, 2004), at <http://www.cato.org/testimony/ct-jg040909.html> (last visited May 7, 2005) [hereinafter Gokhale Statement].

The FAA also argues that along with the decline in learning ability, aging pilots also experience deterioration in their cognitive performance.¹⁶² However, the FAA bases its argument purely on an assumption that if the general population has the likelihood to lose their mental capacity at the age of 60, then pilots must have the same aging progress. This is a false assumption because “pilots are selected for good health at the start of their careers and are subjected to comprehensive medical examinations every 6 months.”¹⁶³ Any symptoms of cognitive decline or mental illness must be detected and corrected.¹⁶⁴ If the decline becomes too serious, the pilot will be dismissed from his position.¹⁶⁵

The FAA has vigorously argued that it is impossible to detect the unpredictable aging process because “[t]he extent to which individual parts, or the body in general, are affected by [aging] cannot be determined accurately by available methods of examination.”¹⁶⁶ The FAA also said that “current tests can predict the course of medical deficiencies accurately but cannot accurately predict the deficiencies accompanying the aging process.”¹⁶⁷ This argument is not valid because “sophisticated and readily available testing programs have been used by the FAA for more than 20 years to determine airline pilot fitness for duty.”¹⁶⁸ These tests are not only widely accepted as having predictive value, but they are also used to test pilots under 60 who return to their positions after surgeries, alcoholism, drug abuse, and psychiatric illnesses.¹⁶⁹ In addition, “computerized neuropsychological test batteries have been developed.”¹⁷⁰ These tests have proven to be accurate in evaluating age-related changes in performance that are critical in pilots’ ability to safely perform flight duties.¹⁷¹ Even if no sufficient test is available to accurately detect the aging changes, the safety of the passengers will not be in jeopardy. This is because “chronological age by itself

¹⁶² Wilkening, *supra* note 134.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ 24 Fed. Reg. at 5248.

¹⁶⁷ Barklow, *supra* note 2, at 354.

¹⁶⁸ Wilkening, *supra* note 134.

¹⁶⁹ *Id.*

¹⁷⁰ Aerospace, *supra* note 12.

¹⁷¹ *Id.*

has little bearing on safety performance [of a pilot].”¹⁷² In fact, one study, which was conducted by the Office of Technology Assessment (“OTA”), stated that “‘a battery of tests that would perfectly predict the risk of developing medical illnesses [based on age]. . . would have a small impact on pilot accident rates.’”¹⁷³ This is because, according to both Hilton Systems Study and Aerospace Medical Association Study, accident rate is actually lower among older pilots (ages 60 to 63) than other age groups.¹⁷⁴ Since no link has truly been established between pilots’ age and accident rate, the lack of a sufficient test to predict the aging progress is irrelevant. The important thing is the pilots’ health status, which can be accurately detected by the battery of tests that are currently in place.¹⁷⁵ Therefore, the FAA’s argument regarding the lack of accurate tests to detect aging changes is really baseless.

The results from the scientific studies not only contradict the FAA’s arguments, but some of them also prove that older commercial pilots may actually be safer than their younger colleagues. Even the FAA admits that a person’s judgment and reasoning can be retained for a long period of time and improved with age.¹⁷⁶ Many studies also show that “[p]erformance in most flight-related tasks such as decision-making, tracking, takeoff, and landing does not differ significantly between older and younger pilots.”¹⁷⁷ Therefore, not only do most critical performance abilities remain with age, some of them actually improve as a pilot ages. Many studies show that older commercial pilots have far more experience than other pilots, and pilots with more experience are safer. The most recent study of 3,306 commuter plane pilots found that “pilots. . . with more than 5,000 hours of flight experience had less than half the risk of a

¹⁷² Karen Blum, *Older Pilots OK to Fly, Study Shows*, Airline Pilots Against Age Discrimination, (May 22, 2003, at <http://www.apaad.org/olderpilotsok.htm> (citing Li, Guohua et al, *Age, Flight Experience and Risk of Crash Involvement in a Cohort of Professional Pilots*, Am. J. of Epidemiology, Vol. 157, No. 10, 874-880 (May 15, 2003) (last visited May 7, 2005)).

¹⁷³ Wells, *supra* note 34, at 761.

¹⁷⁴ Letter from Robin Wilkening to Jim Gibbons, Congressman (May 11, 2001), Airline Pilots Against Age Discrimination, at http://www.apaad.org/wilkening_to_gibbons.htm (last visited May 7, 2005) [hereinafter Letter from Wilkening]; Aerospace, *supra* note 12.

¹⁷⁵ Blum, *supra* note 172.

¹⁷⁶ See 24 Fed. Reg. at 5248.

¹⁷⁷ Blum, *supra* note 172.

crash than less experienced counterparts.”¹⁷⁸ The McFadden Study confirms this finding, as it concludes that “accident rates of U.S. [commercial] airline pilots declined as pilot experience. . . and age increased.”¹⁷⁹ Since the commercial pilots contribute to the most flight time, they have more experience than other pilots. And since they gain more experience as they age, they are actually safer as they get older. This explains why there is a decline in accident rates with pilots ages 60 to 65.¹⁸⁰

In summary, studies have continuously proven the invalidity of the FAA’s justifications. Its concerns of incapacitation, decrease in learning ability, and impossibility to detect the aging process are illogical. The only purpose that those arguments serve is to trigger our human instinct and perception about aging. When we think of people over 60, we probably think of them as “old” people who start to lose their physical and mental capacity.¹⁸¹ This negative perception convinces us to believe in the illusion the FAA created — pilots over 60 will endanger our lives. Because of our preconception of aging, we do not question or analyze the FAA’s justifications. We allow it to hide behind a shield called “safety” and tolerate a rule that discriminates against pilots based solely on their age. The FAA said that there is a lack of “scientific consensus” to change the rule.¹⁸² The truth is, however, that there was a lack of scientific evidence to enact the rule in the first place. A rule that was enacted without foundation should not require “scientific consensus” to overturn it. If the FAA would stop relying on the biased studies and objectively analyze all available studies, it will see that there is in fact a “scientific consensus” to defeat the rule.

¹⁷⁸ *Id.*

¹⁷⁹ Aerospace, *supra* note 12.

¹⁸⁰ *See id.*

¹⁸¹ *Mandatory Retirement: Craig Says Flexibility Needed for Retirement Rules for Pilots – But Safety First*, U.S. Sen. Special Comm. on Aging, (Sept. 14, 2004), at http://aging.senate.gov/index.cfm?FuseAction=pressReleases.Detail&PressRelease_id=442&Month=9&Year=2004 - 25k (last visited May 7, 2005) [hereinafter Craig].

¹⁸² 108 Cong. Rec. S10,502 (Thomas Legislative Information On The Internet, Oct. 11, 2001) (statement of Sen. Robert Smith), at <http://thomas.loc.gov/cgi-bin/query/z?r107:S11OC1-0008>:. (last visited May 7, 2005) [hereinafter 108 CONGRESS].

B. OTHER COUNTRIES HAVE ALREADY ABANDONED THE
“AGE 60 RULE”

Because there is no justification for the “Age 60 Rule” at least 24 foreign nations have either eliminated the rule or changed the mandatory retirement age to either 63 or 65.¹⁸³ The United States is now one of the very few countries that still defends the “Age 60 Rule.”¹⁸⁴ Australian Chief Justice Wilcox said, “Given the time and effort expended in America examining the age 60 rule, it is remarkable to say so, but it seems to me that none of the cited studies supports any conclusion about the relationship between that rule and aircraft safety.”¹⁸⁵ Australia, along with Canada and New Zealand, has no maximum age restrictions for pilots anymore.¹⁸⁶ Similarly, Japan, after conducting a study of its over-60 pilots and found that none had been involved in an accident during the three-year study period, raised its age limit from 63 to 65.¹⁸⁷ The European Union (12 nations) also officially changed its age limit to 65.¹⁸⁸ Most interestingly, some countries do not require additional testing for pilots over age 60, and some added operational restrictions, proficiency checks and medical surveillance for older pilots.¹⁸⁹ One after another, countries around the world have recognized the rule is grounded on a set of illogical reasoning. Eventually, the United States will be standing alone to defend this rule. It is time for us to join the world and open our eyes to the truth — the “Age 60 Rule” was wrongly enacted and should be overturned.

C. ORGANIZATIONS’ SUPPORT IN OVERTURNING THE RULE

The good news is that organizations in the U.S. have started to see the need to change or eliminate the “Age 60 Rule.” In fact, airlines have been huge supporters of modifying the rule, even though they wanted the rule to be enacted in the first place.¹⁹⁰ Ironically, they want the rule to be modified for the

¹⁸³ CRAIG, *supra* note 181.

¹⁸⁴ *See id.*; Petitioners’ Brief, *supra* note 8.

¹⁸⁵ *Chronology*, *supra* note 11.

¹⁸⁶ *Aerospace*, *supra* note 12.

¹⁸⁷ *Id.*

¹⁸⁸ *Chronology*, *supra* note 11.

¹⁸⁹ *Id.*; Statement of Russell B. Rayman, Executive Director, Aerospace Med. Assoc., before U.S. Senate Special Comm. on Aging (Jan. 2004), at http://aging.senate.gov/public/_files/hr130rr.pdf (last visited May 7, 2005) [hereinafter Rayman].

¹⁹⁰ Barklow, *supra* note 2, at 336-37.

same reason they wanted it to be enacted 45 years ago — savings in training costs.¹⁹¹ As more pilots reach age 60 and retire, airlines will have to provide more training for younger or new pilots to take the retired pilots' positions.¹⁹² Just by increasing the retirement age to 65, the airlines could save tremendously in training costs.¹⁹³ In addition, airlines realize experienced pilots are valuable.¹⁹⁴ As the current CEO of AA said in support of modifying the rule, "[having] the ability to retain the services of our senior, well-trained captains for a few more years would represent a step forward in our efforts to be certain that American's cockpits are always manned by the most qualified people."¹⁹⁵

Health organizations such as Civil Aviation Medicine Association, EEOC, AARP and the National Institutes of Health ("NIH") also have expressed support for a change in the rule.¹⁹⁶ The NIH originally stated that the FAA should retain the rule temporarily, despite the fact that its own study shows no relationship between pilots' ages and accident rates.¹⁹⁷ However, in 1985, the NIH abandoned its original position and concluded that "medical testing of pilots after age 60 was both possible and desirable."¹⁹⁸ Now, the NIH supports overturning the "Age 60 Rule."¹⁹⁹

The organization that has recently changed its attitude toward this issue is the ALPA. Many predict that the ALPA will soon switch its position to favor overturning the rule.²⁰⁰ Actually, the ALPA was the first to challenge the rule shortly after it was enacted.²⁰¹ In its lawsuit to seek an injunction against the FAA in 1959, it claimed "the rule 'was arbitrary, discriminatory and without reasonable relation to the standards set forth' in the Federal Aviation Act."²⁰² However, the ALPA changed its posi-

¹⁹¹ *Id.*

¹⁹² *See id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Raphael, *supra* note 58.

¹⁹⁷ Czaplyski, *supra* note 72.

¹⁹⁸ *Id.*

¹⁹⁹ *See id.*

²⁰⁰ Russ Niles, *Pilots' Union Rethinks Retirement Age*, Nov. 29, 2004, at http://www.avweb.com/newswire/10_49a/leadnews/188659-1.html (last visit Sept. 15, 2005).

²⁰¹ Barklow, *supra* note 2, at 339.

²⁰² *Id.* at 340.

tion to support the rule in the 1970s because there was a demographic change in that period of time, as more younger pilots were introduced to be flight engineers.²⁰³ In fact, the number of young pilots became so overwhelming that they held about 70 percent of the memberships in the union.²⁰⁴ The increased number of pilots, who were anxious to advance through seniority into bigger and higher-paying jets, motivated the ALPA to intensely lobby the legislation to retain the "Age 60 Rule" in 1979.²⁰⁵ Even though, in today's economy, one pilot's retirement can make a difference between a layoff or an upgrade to captain in another pilot's career, most pilots favor eliminating the rule.²⁰⁶ This is because the large number of younger pilots back in the 1970s, who fought fiercely to retain the rule, are the ones who are currently suffering from the consequences of this rule.²⁰⁷ They could not possibly predict in 1970 that their pension could decrease by 75 percent when they retire. The ALPA plans to poll its 64,000 members on this issue in Spring, 2005.²⁰⁸ If the result of the poll favors elimination of the "Age 60 Rule," which it probably will, the ALPA will most likely change its position on this issue to support the overturning this rule.²⁰⁹

D. COURTS DISFAVOR THE RULE

Unlike the organizations, courts cannot change their positions easily, as they are bound by legislation. Based on the Age Discrimination in Employment Act ("ADEA"), courts do not have authority to examine the validity of the "Age 60 Rule."²¹⁰ Based on the Administrative Procedure Act ("APA"), courts can only evaluate the FAA's decisions to ensure that they are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."²¹¹ In other words, as long as the FAA has some reason for its decisions, courts may not invalidate them.²¹² Judges defer to agencies' expertise "when enforcing

²⁰³ Letter from Wilkening, *supra* note 174; *Chronology*, *supra* note 11.

²⁰⁴ Dave Gwinn, *Is the Age-60 Rule Fair?*, PLANE AND PILOT MAG., June 2001, at <http://www.planeandpilotmag.com/content/pastissues/2001/jun/intraining.html> (last visited May 7, 2005).

²⁰⁵ *Chronology*, *supra* note 11.

²⁰⁶ Gwinn, *supra* note 204.

²⁰⁷ Adair, *supra* note 33.

²⁰⁸ Niles, *supra* note 200.

²⁰⁹ *See id.*

²¹⁰ *Prof'l Pilots Fed'n v. FAA*, 118 F.3d 758, 762-63 (D.C. Cir. 1997).

²¹¹ *Id.* (citing 5 U.S.C. § 706(2)(A)).

²¹² *See id.*

the APA's requirement of reasoned decision making."²¹³ Because of these restrictions, most courts have ruled against pilots challenging the "Age 60 Rule."²¹⁴ Nevertheless, courts have been hinting that the "Age 60 Rule" should be eliminated or changed.²¹⁵

Over the years, pilots have challenged the rule under three different claims: the ADEA, the APA, and exemptions from the "Age 60 Rule."

1. *The ADEA*

In 1997, the Seventh Circuit, in *Professional Pilots Federation v. FAA*, determined that courts do not have authority to invalidate the "Age 60 Rule" under the ADEA because "the ADEA places no limitation upon the rulemaking authority of the FAA."²¹⁶ In this case, two individual pilots contended that the "Age 60 Rule" violated the ADEA because the ADEA ensures that persons over age 40 are employed based on their ability rather than age.²¹⁷ However, the Seventh Circuit agreed with the FAA that "the ADEA speaks only to employers."²¹⁸ The court based its conclusion on the language of the ADEA, which states that "it shall be unlawful for *an employer*' to discriminate in employment upon the basis of age."²¹⁹ The court stated that if Congress intended to give courts authority to evaluate the rule, it would have said so.²²⁰ Since the ADEA could not apply to the FAA, the court did not explore the bona fide occupational qualification ("BFOQ") exception.²²¹ The court concluded that "[it would] defer to the FAA's decisions to retain the Age 60 Rule."²²²

²¹³ *Id.* at 776.

²¹⁴ *Id.*; *Yetman v. Garvey*, 261 F.3d 664, 679 (7th Cir. 2001); *Baker v. FAA*, 917 F.2d 318, 322-23 (7th Cir. 1990); *Air Line Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892, 897-98 (2d Cir. 1960). *But see Aman v. FAA*, 856 F.2d 946, 957 (7th Cir. 1988).

²¹⁵ *See Barklow*, *supra* note 2, at 346, 352.

²¹⁶ *Profl Pilots Fed'n*, 118 F.3d at 763.

²¹⁷ *See id.* at 762.

²¹⁸ *Id.*

²¹⁹ *Id.* at 763 (citing 29 U.S.C. § 623(a)).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

2. *The APA*

The pilots in *Professional Pilots Federation v. FAA* also challenged the "Age 60 Rule" under the APA.²²³ The Seventh Circuit stated that under the APA, it must approve the FAA's decisions "unless those decisions are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"²²⁴ The court set out linear thresholds for the FAA to meet.²²⁵ First, the court evaluated the FAA's response to the pilots' proposed alternatives: periodic individualized performance checks and gathering data from commercial pilots over 60 by allowing some of them to continue flying commercial aircrafts.²²⁶ The court then concluded that the FAA did not abuse its discretion because it "afforded adequate consideration" to these alternatives.²²⁷ Secondly, the court accepted the FAA's explanation of the need for the rule as adequate even though the FAA did not provide any evidence to support its position.²²⁸ For example, the FAA explained that it allowed younger pilots who suffered from cardiovascular or neurological disease to fly while disallowing the healthy older pilots to fly because there were tests by which the status of a known disease could be reliably monitored.²²⁹ But as the dissent pointed out, "the FAA cites no evidence in its support."²³⁰ Moreover, the FAA did not explain why the same tests that it employs to assess younger pilots' existing illnesses could not be used to make the same determination regarding older pilots.²³¹ The majority, instead of requesting that the FAA provide solid proof for its explanations, accepted the FAA's claim on its face. As the dissent stated, the majority's approach was incorrect because "the APA requires the FAA to provide a sufficient explanation demonstrating that its actions are reasonable."²³² The mere fact that the FAA considered the alternatives and explained its position was not sufficient to prove the reasonableness of its actions.

²²³ *Id.*

²²⁴ *Id.* (citing 5 U.S.C. § 706(2)(A)).

²²⁵ *See id.* at 764-70.

²²⁶ *See id.* at 764-66.

²²⁷ *Id.* at 765.

²²⁸ *See id.* at 764-70; *see also id.* at 771 (Wald, dissenting).

²²⁹ *Id.* at 771 (Wald, dissenting).

²³⁰ *Id.*

²³¹ *Id.* at 772.

²³² *Id.* at 772 n.3.

3. *Exemptions from the "Age 60 Rule"*

The most popular method that pilots use to challenge the rule is by seeking exemption from the "Age 60 Rule."²³³ Pilots would first apply to the FAA for this exemption.²³⁴ However, the FAA has never granted such exemption.²³⁵ Therefore, pilots would then appeal the FAA's denial to the court of appeals.²³⁶ Unfortunately, courts have also not been able to provide remedies for pilots.²³⁷

Although the Federal Aviation Act allows the FAA to grant exemption from the rule "if [the FAA] finds that such an exemption is in the public interest,"²³⁸ "the FAA has established a rigorous benchmark for proving that an exemption is in the public interest."²³⁹ The burden of presenting persuasive evidence is placed solely on the petitioners (i.e. pilots).²⁴⁰ They must (1) prove "why the petition would be in public interest;" (2) provide "the reason why the exemption would not adversely affect safety;" and (3) propose alternatives, "to assess an individual pilot's abilities and risks of subtle and sudden incapacitation."²⁴¹ Courts in these cases cannot examine the validity of the "Age 60 Rule" or "judge whether the petitioning pilots are fit to fly."²⁴² They can only examine the FAA's denial to ensure that it is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."²⁴³ Basically, the courts' role is limited to examining "whether the FAA has appropriately considered the evidence" and if it "provided sufficient justifications for its decisions."²⁴⁴ It is not allowed to "delve into the motivations of the agency."²⁴⁵ This is the reason that courts have been affirming the FAA's denial of exemptions from the rule. As the

²³³ See e.g., *Yetman v. Garvey*, 261 F.3d 664, 667 (7th Cir. 2001); *Baker v. FAA*, 917 F.2d 318, 319 (7th Cir. 1990); *Aman v. FAA*, 856 F.2d 946, 947 (7th Cir. 1988); *Starr v. FAA*, 589 F.2d 307, 308 (7th Cir. 1978).

²³⁴ See *Yetman*, 261 F.3d at 667.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See *id.* at 678-79; *Baker*, 917 F.2d at 323; *Aman*, 856 F.2d at 957; *Starr*, 589 F.2d at 316.

²³⁸ *Yetman*, 261 F.3d at 668.

²³⁹ *Id.*

²⁴⁰ *Id.* at 678.

²⁴¹ *Id.* at 668.

²⁴² *Id.*

²⁴³ *Id.* at 669.

²⁴⁴ *Id.* at 679.

²⁴⁵ *Id.*

Seventh Circuit stated in *Yetman v. Garvey*, "While our review of the evidence submitted by the petitioners might lead us to conclude that a strict age sixty cutoff, without exceptions, is a rule better suited to 1959. . . Congress did not endow this court with the duty to make such a policy judgment."²⁴⁶

Although courts have not been ruling for pilots, they have repetitively hinted their disfavor of the "Age 60 Rule." For example, in *Baker v. FAA*, the Seventh Circuit urged the FAA to examine this rule carefully.²⁴⁷ The court added that the rule is not "sacrosanct and untouchable."²⁴⁸ It stated that "the rule might be overruled if future evidence of accurate individual testing so demands."²⁴⁹ This echoes the Supreme Court's opinion in *Western Airlines, Inc. v. Criswell*.²⁵⁰ The Supreme Court, in this case, was not called on to invalidate the "Age 60 Rule" or to examine the FAA's decision; rather, it overturned an employer's (i.e. Western Air Lines) denial of pilots' applications to be re-assigned as flight engineers upon reaching age 60.²⁵¹ Even though the Court's role was not to examine the "Age 60 Rule" per se, the Supreme Court emphasized the House Committee on Education and Labor's report, which stated that the rule is "'arbitrary'" and . . . age alone is a poor indicator of ability to perform a job . . . [because it] does not take into consideration actual differing abilities and capacities."²⁵²

Although courts are dubious about the "Age 60 Rule," they have continually ruled for the FAA under the ADEA, the APA, and the applications for exemption from the rule. Maybe the real reason for these rulings is because "[t]his stand relieves the courts of any responsibility for safety issues that could remotely develop from an over-sixty pilot flying an aircraft that was involved in an incident or accident."²⁵³ This is their "save-face" position.²⁵⁴

²⁴⁶ *Id.*

²⁴⁷ See Barklow, *supra* note 2, at 352 (citing *Baker v. FAA*, 917 F.2d 318, 323 (7th Cir. 1990)).

²⁴⁸ *Id.* (citing *Baker*, 917 F.2d at 322).

²⁴⁹ *Id.* (citing *Baker*, 917 F.2d at 322-23).

²⁵⁰ *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985).

²⁵¹ *Id.*

²⁵² *Id.* at 410-11, (quoting H.R. REP. NO. 95-527, at 2 (1977)).

²⁵³ Routh, *supra* note 77, at 7.

²⁵⁴ *Id.*

E. FEAR OF BEING BLAMED IS NO LONGER A VALID EXCUSE

Of course, courts are not the only ones that fear being blamed for any aviation disaster with an over 60 pilot at the controls.²⁵⁵ The FAA, legislators, and many other governmental organizations all try to protect their own interests.²⁵⁶ After all, “no one wants to tie the bell on the cat.”²⁵⁷ The change of the “Age 60 Rule” would be a no-win situation, from the FAA’s standpoint, because its duty is solely to protect the safety of the public, not the rights of individuals.²⁵⁸ Therefore, the FAA is not likely to change the rule on its own. Some political pressure must be put on the FAA. This pressure should come from the legislators who, contrary to the FAA’s interests, are responsible to fight for pilots’ rights. With the aviation economic disaster and the pressure from desperate older pilots, legislators are being forced to face the issues that are created by the “Age 60 Rule.” Soon, the legislators will realize that the only way to resolve those issues is to change or eliminate the rule.

The FAA’s sole justification for enacting and retaining the “Age 60 Rule” is safety. However, in reality, safety was never and is not the justification for this rule. The FAA failed to establish a link between aging pilots and accident rates in 1959 when enacting the rule.²⁵⁹ But still it drew an arbitrary line at age 60 as the cut-off age.²⁶⁰ The FAA continually failed to establish this important link. Instead, it relied on biased studies and disregarded unfavorable data.²⁶¹ More importantly, the FAA blinded itself from profound studies which all point to one fact: that chronological age is irrelevant to the safety performance of a pilot.²⁶² Therefore, the “Age 60 Rule” does not protect passengers’ safety. More than 24 foreign nations have opened their eyes to this truth and either eliminated or changed the rule.²⁶³ The United States will soon be standing alone in its defense of the “Age 60 Rule.” Many organizations in the United States, rec-

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 21-22.

²⁵⁷ *Id.* at 22.

²⁵⁸ *Id.*

²⁵⁹ See 24 Fed. Reg. at 5248.

²⁶⁰ *Id.*

²⁶¹ See Woosley, *supra* note 62.

²⁶² See Blum, *supra* note 172.

²⁶³ See CRAIG, *supra* note 181.

ognizing this reality, are advocating to overturn the rule.²⁶⁴ Similarly, courts also recognize the flaws of this rule.²⁶⁵ But their ability to change the rule is restricted by the legislation. As the rule's negative impacts have increased within the last few years due to the negative changes in the airline industry and the aging of the baby boomers, the call for elimination of the rule is more urgent now than ever. The FAA can no longer hide behind the "safety" shield. It must face the truth and adopt a better alternative.

III. POSSIBLE ALTERNATIVES

Many studies, in concluding that the aging of pilots does not cause aviation accidents, have recommended various possible, better alternatives. Although the goal of this Comment is not to explore the alternatives in detail, it is important to summarize the recommendations here for future consideration.

The most recent report from the Aerospace Medical Association summarized the recommended, possible alternatives.²⁶⁶ The first plausible solution is to abandon the "Age 60 Rule" completely.²⁶⁷ Many other countries, such as Australia, Canada, and New Zealand, have followed this path and have so far been successful.²⁶⁸ This alternative is the least costly and most practical because nothing will change with the current performance testing process, except there will no longer be a maximum age restriction.²⁶⁹ Logically, this alternative may work because of "the small number of accidents involving pilot incapacitation."²⁷⁰ Also, "[the] current medical and performance testing of pilots at 6-month intervals appears to be successful in weeding out high-risk pilots."²⁷¹

The second alternative is to change the "Age 60 Rule" and increase the age limit to age 65.²⁷² This alternative has been proposed by many legislators in the U.S. Congress because "[it] is comparable to one made by a major FAA-sponsored study (the

²⁶⁴ See Barklow, *supra* note 2, at 335-37 Raphael, *supra* note 58; Niles, *supra* note 200.

²⁶⁵ See *Criswell*, 472 U.S. at 411; *Baker*, 917 F.2d at 322-23.

²⁶⁶ *Aerospace*, *supra* note 12.

²⁶⁷ *Id.*

²⁶⁸ *Aerospace*, *supra* note 12.

²⁶⁹ See *id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

Hilton Study) that proposed raising the limit to age 63.”²⁷³ However, the line of age 65 is just as arbitrary as age 60, unless it is founded on solid, scientific proof. Many studies need to be conducted to prove the validity of 65 as the cut-off age.

The third alternative is to replace “the age cutoff. . .with other tests that would screen out pilots likely to [cause accidents].”²⁷⁴ Although some countries have implemented this alternative, it is not popular in the United States.²⁷⁵ One major reason is that this solution will involve “a great deal of time, effort, and expense.”²⁷⁶ In addition, all feasible tests must be identified and approved before this recommendation can be implemented. The last, but not least, alternative is to apply to the FAA for an exemption from the “Age 60 Rule” and appeal denials to the court on each individual case.²⁷⁷ Currently, this approach has not worked since no pilot has ever successfully received an exemption.²⁷⁸ The problem with this approach is the time and money it will cost courts to hear and resolve these cases. After all, courts may not be the best route to change or eliminate the “Age 60 Rule,” as they are bound by the lenient law, which is in favor of the FAA’s role in protecting public safety.

The best alternative would probably be to abandon the “Age 60 Rule” and maintain the current tests on pilots. This alternative does not demand additional expenses and resources, as everything remains the same, except for eliminating the requirement that forces pilots over 60 to retire. In addition, this alternative would not sacrifice the safety of the passengers, as studies have shown no link between the aging of pilots and aviation accidents. Since the pilots’ age is irrelevant to accident rates, eliminating the “Age 60 Rule” would not have a negative effect on the aviation safety. In fact, studies have proven that the most important factor is a pilot’s health status.²⁷⁹ Since the current battery of tests is sufficient in detecting pilots’ health problems, there is no need to implement additional tests.

²⁷³ *Id.*; HOUSE HEARING, *supra* note 15.

²⁷⁴ *Aerospace*, *supra* note 12.

²⁷⁵ Petitioners’ Brief, *supra* note 8.

²⁷⁶ Tom Osborne, *Are Mandatory Retirement Ages for Pilots, Firefighters, and Other Professionals Really Necessary?* (Oct. 12, 2004), at Forum AGE, http://www.age-platform.org/forum/message.php3?id_forum=35 (last visited May 7, 2005).

²⁷⁷ Petitioners’ Brief, *supra* note 8.

²⁷⁸ *Id.*

²⁷⁹ See Blum, *supra* note 172.

Therefore, abandoning the "Age 60 Rule" and maintaining the current tests on pilots is the best alternative.

IV. CONCLUSION

A simple rule: commercial pilots who are 60 or over cannot be pilots or co-pilots.²⁸⁰ A truthful fact: the rule was enacted without well-founded scientific proof.²⁸¹ A sad reality: this rule is still in effect after 45 years and is putting thousands of pilots in misery as they turn 60. This is what we are dealing with when we talk about the "Age 60 Rule." For the last 45 years, we have permitted the FAA to hide behind its shield of "safety" to defend this arbitrary rule, which has not only taken away individuals' rights, but it has also caused thousands of pilots to struggle through their retirement in this devastated economy.

If the rule can truly protect public safety, any economic argument cannot win. After all, society's first priority should be to protect the safety of our people. However, as this Comment has shown, studies indicate *no* link between pilots' age and accident rate.²⁸² Although the FAA tries to argue otherwise, the studies they rely on are biased and misleading.²⁸³ In fact, most reliable scientific studies show that because of the experience that commercial pilots accumulate as they age, commercial pilots who are between ages 60 to 65 are actually the safest group compared to pilots in other age groups.²⁸⁴ Therefore, not only does the "Age 60 Rule" have nothing to do with protecting public safety, but it is actually harming aviation safety by prohibiting the most experienced and well-trained pilots from entering cockpits. Forty-five years of tolerating an illogical rule is enough. It is time to act and defeat the "Age 60 Rule." We act not only for social fairness but also for the sake of our own safety on airplanes.

²⁸⁰ See 14 C.F.R. § 121.383(3)(c) (2004).

²⁸¹ See 24 Fed. Reg. at 5247.

²⁸² See Wilkening, *supra* note 134.

²⁸³ See Woolsey, *supra* note 62.

²⁸⁴ See Blum, *supra* note 172.